09-585 NOV 10 2009

No. ____

In The
Supreme Court of the United States

HARVEST INSTITUTE FREEDMAN FEDERATION, BLACK INDIANS UNITED LEGAL DEFENSE FUND AND WILLIAM WARRIOR,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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November 10, 2009

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QUESTION PRESENTED

The claims in this action were brought on behalf of representatives of persons formerly held in bondage by the so-called "Five Civilized" Indian Tribes,[1] hereinafter "Freedmen." The Freedmen were beneficiaries of the various trusts established between the Five Civilized Tribes and the United States by 1866 treaties, which were later modified by further allotments in 1902. The question presented is whether the United States Court of Appeals for the Federal Circuit erroneously affirmed dismissal under 28 U.S.C. §2501 of Petitioners' claims without addressing in any manner whatsoever Petitioners' Repudiation Rule argument that the statute of limitations does not begin to run on claims by a trust beneficiary like Petitioners', against a trustee, here the United States, to enforce the terms of a trust until, the trustee repudiates the trust relationship, something that to date the United States has not done.

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[1] The Five Civilized Tribes were Seminole, Cherokee, Creek, Choctaw and Chickasaw, all of which allied themselves with the Confederacy during the Civil War and attempted to maintain slaves following the War

PARTIES

Petitioners are the Harvest Institute Freedman Federation, William Warrior and Black Indians United Legal Defense and Educational Fund.

This action was brought under the provisions of Title 28 United States Code Sections, 1491 and 1505, to compel the United States as trustee to perform duties owed to Petitioners in their capacity as beneficiaries of certain Indian treaties and express agreements between the United States and various Indian tribes, and 28 U.S.C. §1507. Petitioner, Harvest Institute Freedman Federation Institute (hereinafter the "Institute"), is an organization formed to pursue legal redress and to vindicate the civil and property rights of the descendants of former slaves of both African and Indian ancestry, held in bondage by Indian tribes located within the United States prior to 1866 commonly referred to as Freedman or in some instances Black Indians. The Institute is comprised of the individual Freedmen members of the so called Five Civilized Tribes, Seminole, Creek, Choctaw, Chickasaw and Cherokee. The Institute's members, but for their lack of resources and in some instances education, otherwise have the requisite personal stake in the outcome of this action to sue in their own right, the interests the Institute seeks to protect are germane to its purpose and neither the claims asserted herein nor the relief requested requires the participation of individual Freedmen. Petitioner William Warrior is a descendant of such Freedmen and a representative of the entire class of such persons, a class too numerous to list individually as Petitioners in this action. Specifically, Petitioner Warrior is a lineal descendant of Chief John Horse's Band of Ethnic

Seminole Nation Citizens. Petitioner Black Indian United Legal Defense and Education Fund (hereinafter the "Fund") is an organization formed to provide structural educational and policy guidance to the descendants of Freedmen concerning their status in relation to Native Americans, the States and the United States. Petitioners have suffered an injury that is concrete and particular, actual, directly traceable to the actions of defendants or their predecessors and capable of redress here by a favorable decision.

Respondent is the United States Department of the Interior, the federal agency with jurisdiction over the Bureau of Indian Affairs (BIA). BIA has responsibility for the administration and management of all land held in trust by the United States for American Indians, Indian tribes at Alaskan Nations.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

January 15, 2008 Opinion of United States Court of Federal Claims granting Respondent's Motion to Dismiss. 80 Fed. Cl. 197.

May 14, 2009 Opinion of United States Court of Appeals for the Federal Circuit affirming trial court.

August 12, 2009 Order of United States Court of Appeals for the Federal Circuit denying rehearing.

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit affirming the Federal Court of Claims was entered May 14, 2009. Petitioners' Motion for Rehearing was denied on August 12, 2009. The jurisdiction of this Court is based on 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved in this case, 28 U.S.C. § 1491, 28 U.S.C. § 1505, 28 U.S.C. § 1507, 28 U.S.C. § 2501, 14 Stat. 755, 30 Stat. 567, 14 Stat. 785, 14 Stat. 769, 30 Stat. 496 and 32 Stat. 641, reproduced in Appendix E.

STATEMENT OF THE CASE

This is an appeal from a decision of the United States Court of Appeals for the Federal Circuit that affirmed the trial Court's grant of the motion of the United States to dismiss. The claims in this action were brought by persons seeking monetary relief for the breach of post Civil War treaties between the United States and the Five Civilized Tribes, the Seminole, Cherokee, Creek, Choctaw and Chickasaw Indians.

The action was commenced by the filing of a Complaint which in response to an initial motion to dismiss was amended. The Amended Complaint, contained class allegations, and sought relief on behalf of the Petitioner beneficiaries of the proceeds of the trusts established under treaties between the United States and the Five Civilized Tribes. The United States moved to dismiss the claim as being barred by the six year statute of limitations applicable to claims before the Federal Court of Claims.

The motion to dismiss was granted and affirmed by the Federal Circuit. Petitioners now respectfully seek review of the decision affirming the dismissal.

A. STATEMENT OF THE FACTS

This action was commenced under the provisions of Title 28 United States Code Sections, 1491 and 1505, to compel the United States as trustee to perform duties owed to Petitioners in their capacity as beneficiaries of certain Indian treaties and express agreements between the United States and various Indian tribes, and 28 U.S.C. §1507. Petitioner,

Harvest Institute Freedman Federation Institute (hereinafter the "Institute"), is an organization formed to pursue legal redress and to vindicate the civil and property rights of the descendants of former slaves of both African and Indian ancestry, held in bondage by Indian tribes located within the United States prior to 1866 commonly referred to as Freedman or in some instances Black Indians. Id. The Institute is comprised of the individual Freedmen members of the so called Five Civilized Tribes, Seminole, Creek, Choctaw, Chickasaw and Cherokee. The Institute's members, but for their lack of resources and in some instances education, otherwise have the requisite personal stake in the outcome of this action to sue in their own right, the interests the Institute seeks to protect are germane to its purpose and neither the claims asserted herein nor the relief requested requires the participation of individual Freedmen. Id. Petitioner William Warrior is a descendant of such Freedmen and a representative of the entire class of such persons, a class too numerous to list individually as Petitioners in this action. Specifically, Petitioner Warrior is a lineal descendant of Chief John Horse's Band of Ethnic Seminole Nation Citizens. Id. Petitioner Black Indian United Legal Defense and Education Fund (hereinafter the "Fund") is an organization formed to provide structural educational and policy guidance to the descendants of Freedmen concerning their status in relation to Native Americans, the States and the United States. Petitioners have suffered an injury that is concrete and particular, actual, directly traceable to the actions of Respondent or their predecessors and capable of redress here by a favorable decision. Id.

Respondent is the United States

The underlying action was commenced to obtain relief by reason of Respondent's failure to perform duties imposed upon it by certain treaties between the United States and Indian tribes not loyal to the United States during the War Between the States, 1861-1865. These treaties required these five disloyal Native American tribes to abolish slavery within their respective territories and to, *inter alia*, convey land to the United States for subsequent allocation to Freedmen or to allocate land within the respective tribes territory directly to Black Indians previously held in bondage by the disloyal tribes. Notwithstanding the clear and unambiguous undertaking by the United States of full fiduciary responsibility to cause land and benefits to go to Black Indians, the United States either never conveyed land to the Black Indians as expressly required by the relevant treaties and agreements, failed to cause the tribes to convey land, or in cases where conveyances and related benefits were awarded, failed to provide the requisite assistance and counsel to the beneficiaries to prevent their exploitation by persons desiring to misappropriate the land by insidious means, which resulted in widespread economic injury to Petitioners.

The following statutes and treaties are relevant to the claims set forth within the Amended Complaint:

Seminole Indians:
Ratified Treaty, 14 Stat. 755 (March 21, 1868)
Ratified Agreement, 30 Stat. 567 (July 1, 1898)

Creek Indians:
Ratified Treaty, 14 Stat. 785 (June 14, 1866)

Ratified Agreement, 30 Stat. 495, 514 (June 28, 1898)
Ratified Agreement, 31 Stat. 861 (March 1, 1901)

Cherokee Indians:
Ratified Treaty, 14 Stat. 799 (July 19, 1866)
25 Stat. 608 (March 3, 1883)

Choctaw & Chickasaw Indians:
Ratified Treaty, 14 Stat. 769 (April 28, 1866)
Ratified Agreement, 30 Stat. 495, 505 (June 26, 1898)
Ratified Agreement, 32 Stat. 641 (July 1, 1902)

Seminole Indians:
Ratified Agreement, 31 Stat. 250 (June 2, 1900)

Creek Indians:
Ratified Agreement, 32 Stat. 500 (June 30, 1902)

Cherokee Indians:
Ratified Agreement, 31 Stat. 848 (March 1, 1901)
Ratified Agreement, 32 Stat. 716 (July 1, 1902)

There are two denominated claims. The first seeks a declaration of the "rights and liabilities of the United States in relation to the Black Indians descendants bringing this action as to their entitlement to land allotments and related benefits under each of the treaties set forth above.

Second, the Amended Complaint asserted a damages claim for United States' "failure to perform its duties under the aforementioned treaties" that give rise to "fiduciary" duties on the part of the United States. This claim speaks in terms of "breach of the

various treaties" and the Respondents' "failure to perform its fiduciary duties." Petitioners seek damages in an amount equal to the value of the land and related benefits denied to them.

The Amended Complaint alleges "a continuing duty to Petitioners, each of which gives rise to a separate cause of action" and that there have been "separate" and "daily" breaches of the duty since the "inception of the treaties sued upon." The Amended Complaint generally alleges that the "treaties" obligated the Five Civilized Tribes[2] to either "convey land to the United States for subsequent allocation to Freedmen" or to "allocate land within the respective tribe's territory directly to Black Indians previously held in bondage by the disloyal tribes." The Amended Complaint describes the government's duty as a "full fiduciary responsibility to cause land and benefits to go to Black Indians."

The United States breached this duty because it: (a) "never conveyed land to the Black Indians as expressly required by the relevant treaties and agreements"; (b) "failed to cause the tribes to convey land"; or (c) "in cases where conveyances and related benefits were awarded, failed to provide the requisite assistance and counsel to the beneficiaries to prevent their exploitation by persons desiring to misappropriate the land by insidious means, which resulted in widespread economic injury to Plaintiffs."

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[2] The Creek, Choctaw, Chickasaw, Cherokee, and Seminole.

B. COURSE OF PROCEEDINGS

Petitioners filed their original Complaint in the Federal Court of Claims on December 28, 2006. An Amended Complaint was filed on July 23, 2007. Respondent moved to dismiss the Complaint under 28 U.S.C. Å2501 as having been brought more than six years after the claims accrued. Following oral argument, on January 15, 2008 the Federal Court of Claims dismissed. Petitioner timely appealed the United States Court of Appeals for the Federal Circuit affirmed the dismissal without opinion on May 14, 2009. Petitioners' Motion for Rehearing was denied without opinion on August 12, 2009.

REASON FOR GRANTING THE PETITION

The claims presented by Petitioners concern one of the most shameful and ongoing stains on the honor of Republic. One Hundred Fifty years following the end of involuntary servitude in the United States, a large and clearly cognizable group of American citizens, the Freedmen, continue to suffer the consequences of persistent and overt racial discrimination aided and abetted by the denial and inaction of the federal government. The lower court opinions that state the Freedmens' claim is barred by the statute of limitations, ignore clearly established precedents arising from trust jurisprudence and perpetuates the legacy of discrimination, exclusion ad exploitation that has flowed from historic nonfeasance of the federal government in relation to the Freedmen. The United States Supreme Court is the last hope for justice for these exploited individuals. Accordingly, certiorari should be granted and the civil justice system made

available to these citizens to finally redress their grievances.

During the Civil War, the Five Civilized Tribes entered into treaties with the Confederacy, severing their relations with the United States. In 1866, the United States made treaties with each of the Five Civilized Tribes, setting the terms on which the tribes would continue to exist within the United States. All of the treaties with the Five Civilized Tribes eradicated slavery within the tribes and provided that the emancipated "Freedmen" would have certain rights within the tribes. Although these Treaties had a common purpose, the provisions of the various Treaties were not identical. The following is a summary of the provisions of the treaties pertinent to this appeal.

The Seminole Treaty: The United States entered into its first antebellum treaty with the Seminole in 1866. 14 Stat. 755. The treaty provided that the Freedmen members would have rights equal to those of Seminoles by blood:

> And inasmuch as there are among the Seminoles many persons of African descent and blood, who have no interest or property in the soil, and no recognized civil rights, it is stipulated that hereafter these persons and their descendants, and such other of the same race as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all persons of whatever race or color who may be adopted as citizens or members of said tribe.

14 Stat. 755, 756. In 1898, the Seminole entered into an agreement with the United States to allot its land held in common to individual members. 30 Stat. 567. The agreement made no distinction between the Freedmen members and the members by blood. All Freedmen members, those represented by the Petitioners here, did not receive allotments under this agreement.

The Creek Treaty: The United States' treaty with the Creek is similar to its treaty with the Seminole. It provided that the Creek Freedmen would have all the rights of members by blood, including the right to share equally in land and funds:

> [A]nd inasmuch as there are among the Creeks many persons of African descent, who have no interest in the soil, it is stipulated that hereafter those persons lawfully residing in said Creek country under their laws and usages...shall have and enjoy all the rights and privileges of native citizens, including an equal inters tint he soil and national funds, and the laws of said nation shall be equally binding upon and give equal protection to all such persons, and all others, of whatever race or color, who may be adopted as citizens or members of said tribe.

14 Stat. 785, 786. In 1897, the United States and the Creek Nation agreed to terms on which the Creek Nation's common lands would be allotted. 30 Stat. 496, 514. The agreement made no distinction between Creeks by blood and the Freedmen. In 1901, the Creek entered a second agreement with the United States. 31 Stat. 861. Like the first, this agreement made no

distinction between Creek Indian and Freedmen members. The Creek Freedmen represented by Petitioners here did not receive their allotments on the same terms as the Creek members by blood.

The Cherokee Agreement: The United States entered into a treaty with the Cherokee in 1866. The treaty of 1866, *inter alia* is a basis for Petitioners' claims here. A treaty with the Cherokee Tribe and the United States was concluded on July 19, 1866. Article IV of that Treaty provided that "...[a]ll of the Cherokee freed Negros who were formerly slaves to any Cherokee, and all free Negros not having been slaves, who resided in the Cherokee nation prior to June 1, 1861...shall have the right to settle in and occupy the Canadian district...and will include a quantity of land equal to 160 acres for each person who may so elect to reside in the territory..." Thus, as in the case of the Choctaw and Chickasaw Freedmen, the Cherokee Freedmen were "adopted into the tribe [and] [c]onsequently, they and their descendants were entitled to participate in the allotment of lands equally with members of the tribe by blood." Ross v. Ickes, 130 F.2d 415 (D.C.C. 1942). It is in the failure of the Cherokee to allot land to the Freedmen represented by the Petitioners in this action that gives rise to this Complaint.

The Choctaw and Chickasaw Treaty: The United States entered into a treaty with the Choctaw and Chickasaw Tribes on April 28, 1866. 14 Stat. 769. This treaty provided that the tribes had a choice about how to deal with their Freedmen. If the tribes made their Freedmen members within two years, the tribes would receive a portion of a trust fund, and the Freedmen would receive 40-acre allotments once the

Choctaw, Chickasaw and Kansas Indians had made their selections. If the tribes did not adopt their Freedmen and the Freedmen voluntarily removed themselves to other land within Indian Territory, the tribes would get nothing and the [Freedmen would receive a portion of the trust fund. *Id*] The Choctaw and Chickasaw resisted adopting the Freedmen, so the Freedmen were not entitled to the 40-acre allotments. In 1883, the Choctaw adopted the Freedmen into the tribe and declared each was entitled to 40 acres. The tribe made no allotments at that time either. Choctaw Nation of Indians v. United States, 318 U.S. 423, 425 (1943). The Chickasaw never did adopt their Freedmen into the tribe.

In 1897, the United States entered into an agreement with the Choctaw and Chickasaw whereby their lands held in common would be allotted. 30 Stat. 496, 505-506. This agreement provided that the Choctaw Freedmen would receive 40-acre allotments. 30 Stat. 506. Before any allotments were made, the United States entered into another agreement with the tribes. This second agreement also provided that Choctaw and Chickasaw Freedmen would receive 40 acres. 32 Stat. 641.

While the Choctaw and Chickasaw treaty provided conditional property rights, none of the other treaties entitled the Freedmen to individual property rights. The Freedmen represented by Petitioners here did not receive allotments under their tribes' allotment agreements with the United States at the turn of the 20th century.

A. THE LOWER COURTS FAILED TO ADDRESS THE REPUDIATION RULE ARGUMENT

There is a general "repudiation rule" with regards to equitable trusts that says the statute of limitations will not begin to run on claims to enforce a trust against a trustee until repudiation of the trust relationship. The underlying rationale is that the trustee's possession of trust assets is presumed to be possession for the beneficiary (i.e. the cestui que trust), and the time should begin to run on claims against the trustee only when the trustee has taken some acts or communicated in a way that is inconsistent with that presumption, so as to provide notice that the trustee has disavowed the trust relationship or is no longer acting in the interests of the beneficiary. The repudiation rule is applicable here for the reason the Freedmen are seeking recovery of trust property itself, and the Government has not already repudiated its trust relationship with the Freedmen more than six years before the lawsuit was commenced.

The repudiation rule has appeared in cases involving Native American trust claims. For example, the Court of Appeals for the Federal Circuit affirmed the Claims Court's dismissal of the Tunica-Biloxi Tribe's claims on the basis of statute of limitations in Tunica-Biloxi Tribe v. United States, 1991 U.S. App. LEXIS 10716 (Fed. Cir. May 17, 1991). The Tribe argued that the claims were saved by the repudiation rule, but the Court rejected that contention because the claims were for nonfeasance or malfeasance, as opposed to claims for "recovery of trust corpus." *Id.* at *3-4. It explained:

The Tribe contends, however, that the statute of limitations does not bar its claim because it is based on breach by the government of a fiduciary obligation and, under the law of trusts, a cause of action for breach does not accrue until the trust is repudiated or terminated. Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238, 1249 (N.D. Cal. 1973) (*citing* United States v. Taylor, 104 U.S. 216 (1881). If we assume a trust relationship existed, the rule relied on by the Tribe is applicable to a claim for recovery of corpus under an express trust, *see, e.g.*, Hopland Band, 855 F.2d at 1578, which is not involved here. At best, the assertions of the Tribe are for nonfeasance or malfeasance of the government as trustee. The Tribe contends that the government "failed as trustee to protect the Tribe's landholdings in Louisiana from being illegally possessed by third persons," [Br. at 2] and "failed to instruct its land commissioners as to the modalities of aboriginal use and occupancy, the applicable Spanish law, and neglected to supervise and oversee the operations of the land commission" which "dispossessed the Tribe [sic] of almost all of its landholdings." [Br. at 2-3]

In a malfeasance or nonfeasance case, the alleged breach giving rise to the cause of action can be sufficient to repudiate the trust and start the statute of limitations running. Jones v. United States, 9 Cl. Ct. 292, 295 (1985), *aff'd on other grounds*, 801 F.2d 1334 (Fed. Cir. 1986); *see also Hopland Band*, 855 F.2d at 1578. When the government allegedly breached its trust

> obligations, causing the Tribe to be divested of substantially all of its land over a forty-year period prior to 1840, the claimed trust relationship was effectively repudiated. *Jones*, 801 F.2d at 1336. Accordingly, the Tribe's cause of action was not in any way tolled under trust concepts and the Claims Court's holding that the Tribe's complaint was time-barred under 28 U.S.C. § 2501 was not erroneous.

Similarly, in Jones v. United States, the Claims Court held that the repudiation rule could not be invoked as preserving claims for misfeasance or malfeasance, explaining:

> This rule is not applicable where the claim is for damages arising from misfeasance or nonfeasance by the trustee, rather than for recovery of the trust corpus. For example, in United States v. Taylor the claim was for money held in trust for more than six years by the Secretary of the Treasury. The Court explained that the six year statute of limitations did not apply because the proceeds belonged to plaintiff, and the Secretary was under a ministerial duty to hand it over upon application: "The person entitled to the money could allow it to remain in the treasury for an indefinite period without losing his right to demand and receive it. It follows that if he was not required to demand it within six years, he was not required to sue for it within that time." 104 U.S. at 221. *Accord Russell*, 37 Ct. Cl. at 117-18; *Wayne*, 26 U.S. at 289-90. The theory of these cases appears to be that money which is conceded to be held in trust is not a debt. Since entitlement to the trust

corpus is not in dispute, ownership need not be established by means of lawsuit to which the statute of limitations applies. Only when the trust is repudiated by the trustee, and entitlement to the corpus (or a portion thereof) is claimed adversely to the beneficiary, does the relationship change to that of debtor and creditor, and a lawsuit then becomes necessary to establish entitlement. At that point the statute of limitations begins to run. *Taylor*, 104 U.S. at 222; *Russell*, 37 Ct. Cl. at 118; *Wayne*, 26 Ct. Cl. at 289.

The suit here, for damages arising from misfeasance of the trustee, is fundamentally different from *Taylor*, *Russell* and *Wayne*. This is not a dispute as to entitlement to a trust corpus that defendant is holding adversely to plaintiffs. Here, the theory of recovery is based upon damages suffered because of defendant's mishandling of its trust responsibilities, an action akin to breach of contract, as to which the fact and extent of liability would normally be in dispute. G. Bogert, *The Law of Trusts and Trustees* §§ 861-880 (2d ed. 1984). The question is not whether defendant will give plaintiffs what belongs to them but whether it will be forced to indemnify them for losses suffered in dealings with a third party. Such claims are not covered by the rule expressed in *Taylor* or its progeny, and suit thereon must be brought within six years of defendant's breach of trust. *Menominee*, 726 F.2d at 721-22. In any case, defendant's gross and protracted failure to fulfill its fiduciary responsibility constituted an implicit repudiation of the trust relationship,

> which should have put the beneficiary on notice that she might suffer damages."

9 Cl. Ct. 292, 295-96 (1985) (footnotes omitted).

In Hopland Band of Pomo Indians v. United States, the Court of Appeals for the Federal Circuit held that plaintiffs' claims arising out of an alleged improper conveyance of trust property in by 1967 were time barred because a statute passed by Congress had expressly terminated the trust for the plaintiffs almost 20 years before they filed suit in 1986, even though the Government later reaffirmed the trust. 855 F.2d 1573, 1578-79 (Fed. Cir. 1988).

Although the repudiation doctrine does not apply to claims that by their nature seek indemnification or reimbursement or damages for losses sustained by the Freedmen descendants as a result of mismanagement of trust assets, but where as here the claim is for the trust property itself, may be applied. Its utility is dependent on the precise nature of the relief sought. Here the Freedmen are seeking to recover trust property currently held by the Government, their claims to that property are preserved by the repudiation doctrine.

The repudiation rule has appeared in cases involving Native American trust claims.

The repudiation rule may be applied to claims that seek recovery of the assets themselves, such as land and monetary benefits. Here, the Freedmen are seeking to recover trust property currently held by the Government, their claims to that property is preserved by the repudiation doctrine. The Government has not

expressly repudiated its trust relationship with the Freedmen, thus the statute of limitations has not run.

The lower court failed to address the Repudiation Rule argument at all in its opinion.[3]

CONCLUSION

By reason of the lower courts' failure to address Petitioners Repudiation Rule based argument, the appellate court should be reversed and this matter remanded for discovery and trial on the merits.

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[3] "The general relationship between the United States and the Indian tribes is not comparable to a private trust relationship 'When the source of substantive law intended and recognized only the general, or bare, trust relationship, fiduciary obligations applicable to private trustees are not imposed on the United States.' Rather, the general relationship between Indian tribes and defendant traditionally has been understood to be in the nature of a guardian-ward relationship 'A guardianship is not a trust.' 'The duties of a trustee are more intensive than the duties of some other fiduciaries.' Furthermore, a guardian-ward relationship implies that, at some point, the ward will begin to take responsibility for handling its own affairs By contrast, a private trust relationship is a static relationship, with all encompassing duties forever on the trustee." *Cherokee Nation of Oklahoma v. United States*, 21 Cl Ct 565, 573 (1990) (citations omitted)

November 10, 2009

Respectfully submitted,

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APPENDIX

APPENDIX A

NOTE: This disposition is nonprecedential.

United States Court of Appeals
for the Federal Circuit

2008-5036

[Filed May 14, 2009]

HARVEST INSTITUTE FREEDMAN FEDERATION, BLACK INDIANS UNITED LEGAL DEFENSE FUND, and WILLIAM WARRIOR,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Percy Squire, Percy Squire Company, LLC, of Columbus, Ohio, argued for plaintiffs-appellants.

Elizabeth Ann Peterson, Trial Attorney, Environment and Natural Resources, Appellate Section, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With

her on the brief was Ronald J. Tenpas, Assistant Attorney General.

Appealed from: United States Court of Federal Claims

Senior Judge Robert H. Hodges, Jr.

Judgment

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS

in CASE NO(S). 06-CV-907

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam (SCHALL, GAJARSA, and MOORE, Circuit Judges).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER
OF THE COURT

DATED May 14, 2009

/s/ Jan Horbaly
Jan Horbaly, Clerk

APPENDIX B

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 06-907 L

(Filed: January 15, 2008)

HARVEST INSTITUTE FREEDMAN FEDERATION, BLACK INDIANS UNITED LEGAL DEFENSE FUND, and WILLIAM WARRIOR,

Plaintiffs,

v.

UNITED STATES OF AMERICA

Defendants.

Continuing Claims Doctrine. Statute of Limitations; Subject Matter Jurisdiction; Failure to State a Claim

Percy Squire, Columbus, Ohio, for plaintiffs.

Daniel G. Steele, United States Department of Justice, Environment & Natural Resources Division, Washington, D.C., for defendant.

ORDER AND OPINION

HODGES, Judge.

Plaintiffs seek declaratory and monetary relief for an alleged breach of post-Civil War treaties between the United States and the Five Civilized Tribes.[1] Defendant argues that plaintiffs' claims are barred by the statute of limitations, and that plaintiffs have not pointed to a government obligation that would entitle them to money damages. Plaintiffs contend that the statute of limitations does not apply because of the continuing claims doctrine.

Plaintiffs' claims are barred by the six-year statute of limitations. The treaties in question do not provide a money-mandating remedy for their alleged violation.

BACKGROUND

The United States signed treaties with the five slave-owning tribes that fought with the Confederacy during the Civil War. The treaties prohibited slavery and gave Freedmen equal rights as members of the Tribes. While the treaties had a common purpose of ending slavery, the various treaties were not identical. For example, the Seminole Treaty read,

> inasmuch as there are among the Seminoles many persons of African descent and blood, who have no interest or property in the soil, and no recognized civil rights, it is stipulated that

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[1] The Five Civilized Tribes were Seminole, Cherokee, Creek, Choctow, and Chicksaw.

> hereafter these persons and their descendants, and such other of the same race as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all persons of whatever race or color who may be adopted as citizens or members of said tribe.

14 Stat. 755, 756 (1866).

The Creek Treaty did not address specific property rights for Freedmen, but articulated the principle of equal rights for Freedman adopted into the tribes:

> [I]nasmuch as there are among the Creeks many persons of African descent, who have no interest in the soil, it is stipulated that hereafter those persons lawfully residing in said Creek country under their laws and usages . . . shall have and enjoy all the rights and privileges of native citizens, including an equal interest in the soil and national funds, and the laws of said nation shall be equally binding upon and give equal protection to all such persons, and all others, of whatever race or color, who may be adopted as citizens or members of said tribe.

14 Stat. 785, 786 (1866).

Article IV of the Cherokee Treaty stated:

> All of the Cherokees and freed persons who were formerly slaves to any Cherokee, and all free negroes not having been slaves, who

> resided in the Cherokee nation prior to June 1, 1861 [who decide not to remain in the Cherokee nation] . . . shall have the right to settle in and occupy the Canadian district . . . and will include a quantity of land equal to 160 acres for each person who so elect to reside in the territory . . . .

14 Stat. 799 (1866). The treaty did not distinguish between Cherokees and Freedmen, but gave all members of the tribe equal rights to the allotment of land.

The Choctow and Chickasaw treaties provided that if the tribes made Freedmen members of their tribes within two years, the United States would apportion $300,000 from a trust fund.[2] The adopted Freedmen would receive forty acre allotments once the Choctow and Chickasaw Indians made their selections of land. If the tribes did not adopt their Freedmen, the United States would not apportion the $300,000 from the trust fund. Instead, the Government would hold the funds in trust for those Freedmen the Government would move to other parts of the Indian Territory. Freedmen who did not leave voluntarily were not entitled to any portion of the $300,000 trust and were not entitled to the forty acre allotments. Neither tribe adopted Freedmen within two years. The United States did not voluntarily remove any Freedmen to other parts of the Indian Territory.

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[2] The Choctow's share of the trust would have been three-fourths; the remaining one fourth would go to the Chickasaws.

Plaintiffs, on behalf of the Freedmen, allege that the Tribes did not allocate land properly according to the treaties, and therefore *the Government* did not enforce plaintiffs' rights under the 1866 treaties. They seek the value of the land the Tribes allegedly did not turn over to their ancestors.[3]

DISCUSSION

Lack of Subject Matter Jurisdiction

The statute of limitations bars plaintiffs' claims. "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501. The date of ordinary accrual for a breach of a statutory or regulatory duty is the date when the wrong began. *Menominee Tribe v. United States*, 726 F.2d 718, 721 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 826 (1984). "The statute of limitations is a jurisdictional limitation on the government's waiver of sovereign immunity and therefore must be construed strictly." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-

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[3] The United States created various allotment agreements with the Five Civilized Tribes between 1898 and 1902. Unlike the 1866 treaties, these agreements gave a numerical value to the allotments of land given to the tribes and Freedmen. Plaintiffs do not allege a breach of the allotment agreements in either their complaint or amended complaint, so we do not reach the issue of whether the Government owed Freedmen an obligation under those agreements. If the Government breached an obligation, plaintiffs would be time barred from recovery, because the allocation of land or omission thereof occurred at the latest in 1902. Plaintiffs would have had six years from that date in which to bring a claim in this court

77 (Fed. Cir. 1988). A claim accrues "when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." *Brown Park Estates-Fairfield Development Company,* 127 F.3d 1449, 1455 (Fed. Cir. 1997). Plaintiffs' alleged claims accrued at the latest in 1902.

Plaintiffs allege that the statute of limitations does not apply because of the continuing claims doctrine. The continuing claims doctrine applies where a defendant owes "a continuing duty to [p]laintiffs, each of which gives rise to a separate cause of action. . . . Plaintiff[s'] claims [must be] inherently susceptible to being broken down into a series of independent and distinct wrongs, each having associated damages." *Brown-Park Estates-Fairfield Development Company,* 127 F.3d 1449 at 1456 (citing *Friedman v. United States,* 310 F.2d 381, 159 Ct. Cl. 1, 8 (1962)). *See also Hatter v. United States*, 203 F.3d 795, 798 (Fed. Cir. 2000) (holding continuing claims doctrine applies "where periodic payments are to be made, each successive failure to make proper payments gives rise to a new claim."); *Baka v. United States*, 74 Fed. Cl. 692 (2006) (holding continuing claim arises where periodic payments from plaintiff's retirement pay could be divided into discrete wrongs each time the money was withheld). There must have been multiple events for the doctrine to apply. *Simmons v. United States,* 71 Fed. Cl. 188, 192 (2006)(stating that incorrectly placed boundary markers on an allotment on the Quinault Indian Reservation did not trigger the continuing claims doctrine even though the negative effects of the wrong continued).

Plaintiffs rely heavily on the court's ruling in *Mitchell v. United States*, 10 Cl. Ct. 63 (1986). *Mitchell*

involved the alleged government mismanagement of timber resources on tribal lands. The court applied the continuing claims doctrine where the Government sold timber from tribal lands below market value and failed to regenerate the timber on tribal lands after it was cut and sold. The court found that for each sale of timber below market value and each year the Government did not regenerate timber, the Government breached its duty to act in the best interest of the Tribes. *Mitchell*, 10 Cl. Ct. at 77. *Mitchell* clearly differs from the facts here.

Plaintiffs cannot point to an "independent and distinct" occurrence that would create a "separate and continuous" cause of action. Rather, plaintiffs claim that a new cause of action arose each day the Government failed to force the Tribes to properly allocate lands to Freedmen. Plaintiffs' counsel stated:

> This complaint is not based upon a single act or seminal event. The allegations within the complaint are those that are required in accordance with the authority set forth in *Mitchell* that there has been a series of separate failures on the part of the United States to enforce the obligations of the various treaties set forth in the amended complaint upon which these claims are predicated and that a new claim arises each day.

(Tr. at 18-19.) The one-time act of allotting lands to the Freedmen or omission thereof is distinguishable from recurring and periodic deductions from paychecks or periodic sales of timber from tribal lands below market value. The continuing claims doctrine does not apply to plaintiffs' claims.

Failure to State a Claim

Plaintiffs did not state a claim upon which we could grant them relief. To state a claim for relief, plaintiffs must "invoke a rights creating source of substantive law that can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *United States v. Mitchell*, 463 206, 216-17 (1983) (internal quotations omitted); *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003). A claimant invoking the court's jurisdiction on the basis that the United States breached its trust must identify a statute, treaty, or regulation that imposes a fiduciary duty on the United States. *United States v. Mitchell*, 445 U.S. 535, 542-43 (1980).

Plaintiffs concede that it is "not enough to rely on the general trust relationship between the Native Americans and the [G]overnment." *United States v. Navajo Nation*, 537 U.S. at 506. They point to *Navajo Nation* to suggest that the treaties did not have to be money-mandating for us to have jurisdiction. To be money-mandating, a statute, regulation, or treaty must impose a specific obligation on the part of the Government. This obligation may require performance or prevent it. If the Government breaches that obligation, plaintiffs may be entitled to money damages. The Court in *Navajo Nation* stated: "Those [obligations] need not, however, expressly provide for money damages; the availability of such damages may be inferred." *Id.* Plaintiffs read this to mean that the Government's obligation may be inferred. While the right to money damages may be inferred, the governmental obligation may not.

The 1866 treaties did not create a governmental obligation and we cannot infer one in the absence of specific language in the treaties. At most, the 1866 treaties instructed the Five Civilized Tribes that all former slaves adopted as members of the tribes should be treated as equal members of the tribe and enjoy all the rights of native citizens.

The Chickasaw and Choctow Treaty did not vest property rights in their Freedmen and did not impose an obligation on the Government. This treaty set a condition precedent which, if met, would give certain property rights to the Freedmen. The Chickasaw and Choctow were required to adopt the Freedmen as members of the tribes within two years. If the Chickasaw and Choctow did not adopt the Freedmen, the Freedmen would not be entitled to land allotments from the tribes. Neither tribe adopted Freedmen as members. Therefore, the condition precedent was not met and the property rights did not vest.[4]

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[4] The issue of whether the Chickasaw Freedmen had property interests in land allotments under the 1866 Treaty was litigated in three cases. *See Choctaw Nation of Indians v. United States*, 318 U.S. 423, 425 (1943); *United States v. The Choctaw Nation*, 193 U.S. 115 (1904) (Chickasaw Tribe did not adopt Freedmen; therefore, the Freedmen were not entitled to benefits under the 1866 Treaty); *Casey-El v. United States*, 1991 WL 263714, 1 (Fed. Cir. 1991) (holding "[t]he doctrine of res judicata bars Casey-El from relitigating these claims to land or money under the 1866 Treaty. . . . The Supreme Court adjudicated the rights of the Chickasaw freedmen as a class. . . their ancestors were bound by the results of the Supreme Court case.")

CONCLUSION

The statute of limitations bars review of plaintiffs' claims on the merits. If the Government breached an obligation to the Freedmen, it did so at the turn of the century in a single discrete act. The continuing claims doctrine does not apply in such circumstances, so it does not protect plaintiffs' claims from the statute of limitations bar. Plaintiffs did not show that the treaties, if breached, required the Government to pay money damages.

The Clerk of Court will dismiss plaintiffs' Complaint for lack of jurisdiction and failure to state a claim, and enter judgment for defendant. No costs.

SO ORDERED.

s/ Robert H. Hodges, Jr.
Robert H. Hodges, Jr.
Judge

APPENDIX C

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 06-907 L

(Filed: November 15, 2007)

HARVEST INSTITUTE FREEDMAN FEDERATION, BLACK INDIANS UNITED LEGAL DEFENSE FUND, and WILLIAM WARRIOR,	)
Plaintiffs,	)
v.	)
UNITED STATES OF AMERICA,	)
Defendants.	)

ORDER

Plaintiffs filed a motion for leave to file a Second Amended Complaint on November 9. According to RCFC 15 (a), "[a] party may amend the party's pleading once as a matter of course ... [o]therwise a party may amend the party's pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Prior to receiving plaintiffs motion, this

court held a hearing on defendant's motion to dismiss. Plaintiff has addressed the issues it seeks to enter through an Amended Complaint. Plaintiffs motion is DENIED.

SO ORDERED.

s/Robrrt H. Hodges, Jr.
Robert H. Hodges, Jr.
Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2008-5036

[Filed August 12, 2009]

HARVEST INSTITUTE FREEDMAN FEDERATION, BLACK INDIANS UNITED LEGAL DEFENSE FUND, and WILLIAM WARRIOR,	)
Plaintiffs-Appellants,	)
v.	)
UNITED STATES,	)
Defendant-Appellee.	)

Appeal from the Unitd States Court of Federal Claims in 06-CV-907, Senior Judge Robert H. Hodges, Jr.

ORDER

NOTE: This order is nonprecedential.

Before Schall, Circuit Judge, Gajarsa, Circuit Judge, and Moore, Circuit Judge.

A petition for rehearing having been filed by the Appellant,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on August 19, 2009.

FOR THE COURT,

/s/Jan Horbaly
Jan Horbaly
Clerk

Dated: 08/12/2009

cc: Percy Squire
Elizabeth Ann Peterson

HARVEST INSTITUTE V US. 2008-5036
(CFC - 06-CV-907)

APPENDIX E

28 U.S.C. § 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)

(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any

administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

(b)

(1) Both the Unites [1] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief

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[1] So in original. Probably should be "United"

except that any monetary relief shall be limited to bid preparation and proposal costs.

(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.

(5) If a private sector interested party commences an action described in paragraph (1) in the case of a public-private competition conducted under Office of Management and Budget Circular A–76 regarding performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A–76, then an official or person described in section 3551 (2)(B) of title 31 shall be entitled to intervene in that action.

(c) Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

28 U.S.C. § 1505. Indian claims

The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

28 U.S.C. § 1507: Jurisdiction for certain declaratory judgments

The United States Court of Federal Claims shall have jurisdiction to hear any suit for and issue a declaratory judgment under section 7428 of the Internal Revenue Code of 1986.

28 U.S.C. § 2501. Time for filing suit

Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Every claim under section 1497 of this title shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvements operations on which the claim is based.

A petition on the claim of a person under legal disability or beyond the seas at the time the claim

accrues may be filed within three years after the disability ceases.

A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the Government Accountability Office fails to act within six months after receiving the account.

14 Stat. 755

The Office of the President of the United States

(TREATY)

TREATY WITH THE SEMINOLE, 1866.

March 21, 1866.

* * *

[p.756]

Military occupation and protection by the United States.

The Seminoles also agree to remain at peace with all other Indian tribes, and with themselves. In return for these pledges of peace and friendship, the United States guarantee them quiet possession of their country, and protection against hostilities on the part of other tribes; and, in the event of such hostilities, that the tribe commencing and prosecuting the same shall make just reparation therefor. Therefore the Seminoles agree to a military occupation of their country at the option and expense of the United States.

Amnesty.

A general amnesty of all past offences against the laws of the United States, committed by any member of the Seminole nation, is hereby declared; and the Seminoles, anxious for the restoration of kind and friendly feelings among

themselves, do hereby declare an amnesty for all past offenses against their government, and no Indian or Indians shall be proscribed or any act of forfeiture or confiscation passed against those who have remained friendly to or taken up arms against the United States, but they shall enjoy equal privileges with other members of said tribe, and all laws heretofore passed inconsistent herewith are hereby declared inoperative.

Slavery not to exist among the Seminoles.

ARTICLE II. The Seminole nation covenant that henceforth in said nation slavery shall not exist, nor involuntary servitude, except for and in punishment of crime, whereof the offending party shall first have been duly convicted in accordance with law, applicable to all the members of said nation. And inasmuch as there are among the Seminoles many persons of African descent and blood, who have no interest or property in the soil, and no recognized civil rights, it is stipulated that hereafter these persons and their descendants, and such other of the same race as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all persons of whatever race or color, who may be adopted as citizens or members of said tribe.

Rights of those of African descent.

Cession of

ARTICLE III. In compliance with

lands to the United States

the desire of the United States to locate other Indians and freedmen thereon, the Seminoles cede and convey to the United States their entire domain, being the tract of land ceded to the Seminole Indians by the Creek nation under the provisions of article first, (1st,) treaty of the United States with the Creeks and Seminoles, made and concluded at Washington, D.C., August 7, 1856. In

Payment by the United States.

consideration of said grant and cession of their lands, estimated at two million one hundred and sixty-nine thousand and eighty (2,169,080) acres, the United States agree to pay said Seminole nation the sum of three hundred and twenty-five thousand three hundred and sixty-two ($325,362) dollars, said purchase being at

Grant to the Seminoles.

the rate of fifteen cents per acre. The United States having obtained by grant of the Creek Nation the westerly half of their lands, hereby grant to the Seminole Nation the portion thereof hereafter described, which shall constitute the national domain of the Seminole Indians. Said lands so granted by the United States to the Seminole nation are

Boundaries.

bounded and described as follows, to wit: Beginning on the Canadian River where the line dividing the Creek lands according to the terms of their sale to the United States by their treaty of February 6, 1866, following said line due north to where said line crosses the north fork of the Canadian River; thence up said north

fork of the Canadian River a distance sufficient to make two hundred thousand acres by running due south to the Canadian River; thence down said Canadian River to the place of beginning.

Payment therefor.

In consideration of said cession of two hundred thousand acres of land described above, the Seminole nation agrees to pay therefor the price of fifty cents per acre, amounting to the sum of one hundred thousand dollars, which amount shall be deducted from the sum paid by the United States for Seminole lands under the stipulations above written.

Balance due the Seminoles.

The balance due the Seminole nation after making said deduction, amounting to one hundred thousand dollars, the United States agree

* * *

14 Stat. 785

The Office of the President of the United States

(TREATY)

TREATY WITH THE CREEK INDIANS, 1866.

June 14, 1866.

* * *

[p.786]

of the Creek Nation, the day and year above mentioned, mutually stipulate and agree, on behalf of the respective parties, as follows, to wit:–

Peace and friendship.

ARTICLE I. There shall be perpetual peace and friendship between the parties to this treaty, and the Creeks bind themselves to remain firm allies and friends of the United States, and never to take up arms against the United States, but always faithfully to aid in putting down its enemies. They also agree to remain at peace with all other Indian tribes; and, in return, the United States guarantees them quiet possession of their country, and protection against hostilities on the part of other tribes. In the event of hostilities, the United States agree that the tribe commencing and prosecuting the same, shall, as far as

Military occupation and protection by the United States.

Amnesty.

may be practicable, make just reparation therefor. To insure this protection, the Creeks agree to a military occupation of their country, at any time, by the United States, and the United States agree to station and continue in said country from time to time, at its own expense, such force as may be necessary for that purpose. A general amnesty of all past offenses against the laws of the United States, committed by any member of the Creek Nation, is hereby declared. And the Creeks, anxious for the restoration of kind and friendly feelings among themselves, do hereby declare an amnesty for all past offenses against their government, and no Indian or Indians shall be proscribed, or any act of forfeiture or confiscation passed against those who have remained friendly to, or taken up arms against, the United States, but they shall enjoy equal privileges with other members of said tribe, and all laws heretofore passed inconsistent herewith are hereby declared inoperative.

Slavery not to exist among the Creeks.

ARTICLE II. The Creeks hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted in accordance with laws applicable to all members of said tribe, shall ever exist in

Rights of those of African descent.

said nation; and inasmuch as there are among the Creeks many persons of African descent, who have no interest in the soil, it is stipulated that hereafter these persons lawfully residing in said Creek country under their laws and usages, or who have been thus residing in said country, and may return within one year from the ratification of this treaty, and their descendants and such others of the same race as may be permitted by the laws of the said nation to settle within the limits of the jurisdiction of the Creek Nation as citizens [thereof,] shall have and enjoy all the rights and privileges of native citizens, including an equal interest in the soil and national funds, and the laws of the said nation shall be equally binding upon and give equal protection to all such persons, and all others, of whatsoever race or color, who may be adopted as citizens or members of said tribe.

Cession of lands to the United States.

ARTICLE III. In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Creeks hereby cede and convey to the United States, to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon, the west half of their entire domain, to be divided by a line running north and south; the eastern half of said Creek lands, being retained by them,

shall, except as herein otherwise stipulated, be forever set apart as a home for said Creek Nation; and in consideration of said cession of the west half of their lands, estimated to contain three millions two hundred and fifty thousand five hundred and sixty acres, the United States agree to pay the sum of thirty (30) cents per acre, amounting to nine hundred and seventy-five thousand one hundred and sixty-eight dollars, in the manner hereinafter provided, to wit: two hundred thousand dollars shall be paid per capita in money, unless otherwise directed by the President of the United States, upon the ratification of this treaty, to enable the Creeks to occupy, restore, and improve their farms, and to make their

Payments therefor, and mode of payment.

Amendment *Post*, p 791

* * *

30 Stat. 496

June 28, 1898.

CHAP. 517 – An Act For the protection of the people of the Indian Territory, and for other purposes.

* * *

[p.505]

officer of said courts shall thereafter have any authority whatever to do or perform any act theretofore authorized by any law in connection with said courts, or to receive any pay for same; and all civil and criminal causes then pending in any such court shall be transferred to the United States court in said Territory by filing with the clerk of the court the original papers in the suit: *Provided*, That this section shall not be in force as to the Chickasaw, Choctaw, and Creek tribes or nations until the first day of October, eighteen hundred and ninety-eight.

– transfer of pending cases

Proviso. When to take effect as to Chickasaws, etc.

SEC. 29. That the agreement made by the Commission to the Five Civilized Tribes with commissions representing the Choctaw and Chickasaw tribes of Indians on the twenty-third day of April, eighteen hundred and ninety-seven, as herein amended, is hereby ratified and confirmed, and the same shall be of full force and effect if ratified before the first

Agreement with Cocotaw and Chickasaw tribes of Indians.

– to be voted on ; proclamation.

day of December, eighteen hundred and ninety-eight, by a majority of the whole number of votes cast by the members of said tribes at an election held for that purpose; and the executives of said tribes are hereby authorized and directed to make public proclamation that said agreement shall be voted on at the next general election, or at any special election to be called by such executives for the purpose of voting on said agreement; and at the election held for such purpose all make members of each of said tribes qualified to vote under his trial laws shall have the right to vote at the election precinct most convenient to his residence, whether the same be within the bounds of his tribe or not: *Provided*, That no person whose right to citizenship in either of said tribes or nations is now contested in original or appellate proceedings before any United States court shall be permitted to vote at said election; *Provided further*, That the votes cast in both said tribes or nations shall be forthwith returned duly certified by the precinct officers to the national secretaries of said tribes or nations, and shall be presented by said national secretaries to a board of commissioners consisting of the principal chief and national secretary of the Choctaw Nation, the governor and national secretary of the Chickasaw Nation, and a member of the Commission to the Five Civilized

Provisos. Ineligible to vote.

Board to canvass and count votes.

Tribes, to be designated by the chairman of said commission; and said board shall meed without delay at Atoka, in the Indian Territory, and canvass and count said votes and make proclamation of the result; and if said agreement as amended be so ratified, the provisions of this Act shall then only apply to said tribes where the same do not conflict with the provisions of said agreement; but the provisions of said agreement, if so ratified, shall not in any manner affect the provisions of section fourteen of this Act, which said amended agreement is as follows:

–act not to conflict with agreement.

Ante p. 499.

This agreement, by and between the Government of the United States, of their first part, entered into in its behalf by the Commission to the Five Civilized Tribes, Henry L. Dawes, Frank C. Armstrong, Archibald S. McKennon, Thomas B. Cabaniss, and Alexander B. Montgomery, duly appointed and authorized thereunto, and the governments of the Choctaw and Chickasaw tribes or nations of Indians in the Indian Territory, respectively, of the second part, entered into in behalf of such Choctaw and Chickasaw governments, duly appointed and authorized thereunto, viz: Green McCurtain, J.S. Standley, N.B. Ainsworth, Ben Hampton, Wesley Anderson, Amos Henry, D.C. Garland, and A.S. Williams, in behalf of the Choctaw Tribe or Nation, and R.M. Harris, I.O. Lewis, Holmes Colbert, P.S.

Mosely, M.V. Cheadle, R.L. Murray, William Perry, A.H. Colbert, an R.L. Boyd, in behalf of the Chickasaw Tribe or Nation.

Allotment of lands.

ALLOTMENT OF LANDS.

Witnessetn, That in consideration of the mutual undertakings, herein contained, it is agreed as follows:

That all the lands withing the Indian Territory belonging to the Choctaw and Chickasaw Indians shall be alloted to the members of said tribes so as to give to each member of these tribes so far as possible a

* * *

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(2)

Supreme Court, U.S.
FILED
FEB 16 2010
OFFICE OF THE CLERK

No. 09-585

In The
Supreme Court of the United States

HARVEST INSTITUTE FREEDMAN FEDERATION, BLACK INDIANS UNITED LEGAL DEFENSE FUND AND WILLIAM WARRIOR,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

This Petition for Rehearing is submitted under the provisions of Supreme Court Rule 44(2). It is filed by reason of the tentative resolution of claims by the United States in United States District Court for the District of Columbia in, Eloise Pepion Cobell, et al. v. Ken Salazar, Secretary of the Interior, et al., Case No. 1:96cv01285-JR a case involving the breach of duties owed by the United States to beneficiaries of trusts created under various treaties with Native Americans. The same mismanagement of trust responsibilities theory is applicable to the claims in this appeal, except the Petitioners here are persons of African Ancestry, so-called "Freedmen[1]." Rehearing is requested in order

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[1] According to correspondence from Paul Tsosie Chief of Staff to the Assistant Secretary-Indian Affairs, United States Department of Interior on December 28, 2009, to Petitioner representative, Angela Molette:

> "As you may know, "Black Indians" are known by many names throughout Indian Country. Depending upon the tribe in question, these people may be descendants of slaves, inter-married black and Indian mix-blood Indians, or other combinations of heritage that are recognized by the respective Indian tribes. In the case of the Five Civilized Tribes, as you note in your letter, these people are commonly identified as "freedmen" within their tribes. In many cases, they enjoy tribal membership, have their own bands and are recognized as a vital part of their tribes. As for blood quantum requirements for Federal programs, however, these determinations are necessary to respond to the strict dictates of the laws and regulations that guide the administration of these programs, designed for Indians because of their status as Indians. While some of the "Black Indians" you identify

to avoid the unlawful racial discrimination and perpetuation of historic injustice, that has characterized the treatment by the United States of Freedmen versus other Native American ethnic groups. The Cobell settlement is an event that occurred subsequent to the filing of the Petition for a Writ of Certiorari, in this matter.

U.S. Supreme Court review is requested of a U.S. Court of Claims trial court dismissal and United States Court of Appeals for the Federal Circuit affirmance of the Petitioners' putative class action which alleged, inter alia, that the United States as trustee mismanaged and breached duties owed to the beneficiaries of various trusts established by the terms of post civil war treaties between the so-called Five Civilized Indian Tribes ("the Tribes") and the United States. Under these treaties, the Tribes agreed to abolish slavery within their territories and to grant equal citizenship to their former slaves, the "Freedmen". In numerous instances, due to their condition of former bondage, the Freedmen were exploited. The benefits to which they were entitled under the treaties were, with the knowledge and complicity of the United States, not accorded to them or usurped. The Petitioners' claims were dismissed below on grounds that a breach of trust claim is

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may not meet these blood quantum requirements, this does not take away their right as tribal members, having full rights to tribally generated programs and services. We do appreciate your concerns in this area; however, we believe that the impacted tribes with these identified individuals have reached an accord with them with respect to citizenship, membership, services, and other tribal-oriented programs." (Emphasis added.)

subject to a six year statute of limitations under the Tucker Act and Indian Tucker Act, 28 U.S.C. §1505. The Petitioners' claims here, it is alleged by the United States, accrued at the latest in 1902 when Congress entered into allotment agreements with the Tribes, subdividing their territories into individual 40 and 160 acre parcels. Petitioners have argued that the statute of limitations should not begin to run on their claims until the trustee, here the United States, repudiates its trust responsibility to the Freedmen beneficiaries, an event that has not yet occurred. Neither the Court of Claims nor the Court of Appeals addressed Petitioners' repudiation argument. Petitioners' argument that the United States has mismanaged its trust responsibility to the putative Freedman class, has not been disputed by the United States. The United States merely contends that the claim is time barred.

Concurrently an action has been pending in the United States District Court for the District of Columbia, Cobell v. Salazar, Case No. 1:96-cv-01285-JR, alleging that the United States as trustee of certain individual Indian money trust accounts has mismanaged these trust accounts and its duty as trustee by failing to keep adequate records, destroying records, failing to account to trust beneficiaries and converting the beneficiaries' funds to the use of the United States.

Both Cobell and the Petitioners' cases allege that the United States as trustee, has mismanaged its responsibilities as a trustee and breached duties owed to the beneficiaries of a trust.

Cobell is now pending resolution. The Petitioners' grievances have not been adequately addressed by the United States. The Freedmen are U.S. citizens and have been exploited, ignored and relegated to second class status solely by reason of race. Settling Cobell, but not the Freedmen action, is a perpetuation of the historic harm visited upon this class of disadvantaged American citizens.

Rehearing is respectfully requested.

CONCLUSION

For the reasons stated above, this Court should consider the grant of the petition for rehearing.

Respectfully submitted,

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CERTIFICATION

The forgoing is restricted to the grounds specified in 44.2 Sup. Ct. R. and it is presented in good faith and not for delay.

Percy Squire, Esq. (0022010)